CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

No. ~~536~~ 82

L. M. WILLCUTS, AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MINNESOTA, PETITIONER

vs.

CHARLES W. BUNN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 23, 1929
CERTIORARI GRANTED JANUARY 27, 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 535

L. M. WILLCUTS, AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MINNESOTA, PETITIONER

vs.

CHARLES W. BUNN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1929, of said court, before the honorable Kimbrough Stone, the honorable Wilbur F. Booth, and the honorable Archibald K. Gardner, Circuit Judges.

Attest:

[SEAL.] E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the twenty-fifth day of March, A. D. 1929, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Minnesota was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein L. M. Willcuts, as collector of internal revenue for the district of Minnesota, was appellant and Charles W. Bunn was appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to wit:

1 United States District Court, District of Minnesota, Third Division.

Charles W. Bunn, Plaintiff,
No. 1872 vs. Law.
L. M. Willcuts, as Collector of Internal Revenue for the District of Minnesota, Defendant.

Pleas before the Honorable, the Judges of the United States District Court for the District of Minnesota.

Be It Remembered, that on the 19th day of July, 1928, there was filed in said Court in said action a complaint in the words and figures following, to-wit:

2 Complaint.

United States District Court, District of Minnesota, Third Division.

Charles W. Bunn, Plaintiff,
No. .... vs. At Law.
L. M. Willcuts, as Collector of Internal Revenue for the District of Minnesota, Defendant.

Plaintiff complains of the defendant above named and alleges:

I.

That this is a case arising under a law providing for internal revenue, to-wit; under the Revenue Act of 1924. That the defendant is and at the dates herein mentioned was the duly appointed and acting Collector of Internal Revenue for the District of Minnesota.

II.

That the plaintiff resides in Minnesota and was in receipt of taxable income in the year 1924. That he punctually made full return of said taxable income to the defendant, and punctually paid the tax payable thereon. Thereafter, under date of February 17, 1928, the Commissioner of Internal Revenue, upon review of said return, purported to determine that

there was due from the plaintiff additional income tax for the year 1924 in the sum of Eighty-five and 44/100 Dollars ($85.44), for which amount, with interest in the sum of
3 Fourteen and 07/100 Dollars ($14.07), amounting together to the sum of Ninety-nine and 51/100 Dollars, ($99.51) the defendant made demand upon the plaintiff on or about May 4, 1928.

III.

That the facts giving rise to said purported determination of additional tax and demand for payment are as follows:

At various dates in the years 1919 and 1920 the plaintiff purchased for cash, as investments, certain bonds issued by various counties and cities in the State of Minnesota. In the month of January 1924 the plaintiff sold all of the said bonds, and realized upon the whole transaction a net profit (disregarding interest accrued on coupons) of Seven Hundred Thirty-six and 26/100 Dollars ($736.26). Upon this net profit (less a net loss of Forty-one and 20/100 Dollars ($41.20) suffered by plaintiff on certain similar bonds held less than two years) the Commissioner of Internal Revenue determined and the defendant demanded payment of additional income tax in the amount above alleged. The facts found by the Commissioner are true, his arithmetical calculations are correct, and the amount of additional tax determined and demanded is correct if the said profit derived as aforesaid is lawfully taxable as income.

IV.

On May 8, 1928, plaintiff paid to the defendant, under duress and protest, the said additional tax demanded, with interest, totalling Ninety-nine and 51/100 Dollars ($99.51). Thereupon plaintiff duly filed with the Commissioner of Internal Revenue a claim for refund of said additional tax, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof. The basis of said claim for refund, as therein stated, was that: "The tax was illegal because assessed in income from municipal bonds issued by political subdivisions of states." Upon June 19, 1928, the Commissioner of Internal Revenue rejected the said claim and so advised the plaintiff.
4

V.

The said additional tax was illegal for the reason stated in said claims for refund; and the Revenue Act of 1924,

if construed and applied to tax the said income so received by plaintiff by way of profit on the sale of said municipal securities, is in fact a tax upon the instrumentalities of states and is unconstitutional and void for that reason.

Wherefore plaintiff demands judgment against defendant in the sum of Ninety-nine and 51/100 Dollars ($99.51), with interest at six per cent (6%) per annum from May 8, 1928, together with his costs and disbursements in this action.

DOHERTY, RUMBLE,
BUNN & BUTLER,
Attorneys for Plaintiff,
1006 Merchants National Bank
Bldg., Saint Paul, Minnesota.

5 State of Minnesota,
County of Ramsey—ss.

Charles W. Bunn, being first duly sworn, deposes and says that he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

CHARLES W. BUNN,

Subscribed and sworn to before me this 19th day of July, 1928.

EDWIN IRLE.

(Notarial Seal)

Notary Public, Hennepin County, Minn.

My commission expires Nov. 28, 1929.

(Endorsed) Complaint Filed July 19, 1928, Joel M. Dickey, Clerk.

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6 (Demurrer to Complaint.)

Now comes the defendant in the above entitled action and demurs to the plaintiffs complaint herein for the reason that said complaint does not state facts sufficient to constitute a cause of action.

LEWIS L. DRILL,
Attorney for the Defendant &
United States Attorney.

(Endorsed): Demurrer. Filed August 15, 1928, Joel M. Dickey, Clerk.

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7 (Order Overruling Demurrer to Complaint.)

United States District Court, District of Minnesota, Third Division.

Charles W. Bunn, Plaintiff,

vs.

L. M. Willcuts, as Collector of Internal Revenue for the District of Minnesota, Defendant.

The defendant having interposed a demurrer to plaintiff's complaint herein, on the ground that said complaint does not state facts sufficient to constitute a cause of action, the matter came on regularly for hearing before the court, Mr. Lewis L. Drill, United States Attorney, and Mr. Martin W. Goldsworthy, Special Attorney, Buerau of Internal Revenue, appearing for the defendant in support of said demurrer, and Mr. Chas. Bunn appearing for the plaintiff in opposition thereto. The court having heard and considered the arguments of counsel, and being now fully advised in the premises,

It Is Ordered that said demurrer be and the same hereby is overruled.

Dated November 17, 1928.

By the Court

WM. A. CANT,
United States District Judge.

Memorandum.

Plaintiff purchased certain bonds issued by municipal corporations of the State of Minnesota, and thereafter sold such bonds at a profit. Under the Revenue law of United States, the government levied a tax on the profit so realized by plaintiff, and, under protest, plaintiff paid such tax. He has brought this action to recover the amount so paid. Defendant has interposed a demurrer to plaintiff's complaint
8 on the ground that the same does not set forth facts sufficient to constitute a cause of action. The question for determination is whether gains or profits of the character here in question are subject to such tax.

The means and instrumentalities of a state government are exempt from taxation by the United States. The Collector vs. Day, 11 Wallace, 113, 1927. This principle is not based upon any constitutional provision. It rests on necessary

implication. Id. The rule extends to obligations issued by the State, or by any political subdivision thereof. Pollock vs. Farmers' Loan & Trust Co., 157 U. S., 429, 583, et seq. It also covers income arising from such obligations. Id. Pp. 583, 585, 586. Metcalf & Eddy vs. Mitchell, 269 U. S. 514, 522. The rule does not rest upon the language of the statute quoted at page 585 of the Pollock case, but upon general principles of law. Pp. 585, 586, Pollock case.

The broad terms of the Sixteenth Amendment, under which the tax in question was imposed, did not extend the taxing power of the United States to new subjects. In that behalf, the earlier rules above stated still prevail. Evans vs. Gore, 253 U. S., 245.

It is, therefore, beyond dispute that income from bonds such as those here in question, is not subject to a tax under the Revenue law. Limited still further, the question here is whether gains and profits realized on the sale of such bonds, are income within the meaning of the law.

Confessedly, the tax here in question was a tax on income. Otherwise, there would be no jurisdiction for its levy. Clearly that income was derived from municipal bonds issued under the authority of the State of Minnesota.

In such cases the underlying principle is that the Federal Government shall not exercise the power of taxation in such manner as in any substantial degree to interfere with the State in any of its governmental functions. In the performance of such functions, the State and its various subdivisions require money. They often borrow. In such cases bonds or other obligations are issued and are offered for sale to the investing public. A tax on such obligations, or on the income therefrom, is a burden thereon and makes them less desirable and less salable in the market. It interferes with the demand for such obligations and with the success of the State or other political subdivision in raising money through their sale. Under the principle hereinbefore stated, no such tax is valid.

In like manner, if at the time that any issue of State or municipal bonds is offered to the investing public, it shall be known that any gain or profit realized from a rise in value of such bonds, and a sale thereof would be subject to a Federal tax, which might be increased at any time, this circumstance would operate to discourage the public from dealing in such securities, and would cause a reduction in the price which purchasers would be willing to pay therefor.

The imposition of such a tax, therefore, would affect the power of the State or municipality to borrow money and also the amount which could be realized from the sale of its securities. This would be an unjustifiable interference with the financial operations of the governmental subdivision in question, and, equally wth a tax directly imposed on the bonds themselves, and for substantially the same reasons, should be held invalid.

9 Unless expressly prohibited by law, the State may impose a tax on its own outstanding obligations. The Federal government may impose a tax on obligations issued under its authority. Neither may impose a tax on obligations issued by the other.

The following language of Chief Justice Marshall, in Weston vs. City Council of Charleston, 2 Peters, 449, 468, applies:

"The right to tax the contract to any extent, when made, must operate upon the power to borrow, before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government; to any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely."

This language is quoted in Pollock vs. Farmers' Loan & Trust Co., 157 P. S. 429, 586, and is followed by a statement reading as follows:

"Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution."

In such cases, it is an advantage to the purchaser and to the governmental subdivision which issues such securities, that such purchaser shall be permitted to acquire the securities free from the possibility that any tax will be imposed on the obligation or on the proceeds thereof. That advantage is important. Any interference therewith affects the State or other governmental subdivision adversely, and in a substantial degree, in the exercise of its governmental functions, and such was the effect of the tax here in question

Upon either of two separate grounds the tax here involved should be held invalid:

1. Because the gain or profit on which the tax was levied, was income arising from the bonds here in question and was beyond the power of the government to tax.

2. Because, whether such gain or profit be regarded as income strictly so called, or not, the levy of a tax thereon was and is within the reason of the rule which forbids a tax on the securities in question, or on the interest arising therefrom.

The tax was either a tax on the bonds themselves, or a tax on the income arising therefrom. On its face it was the latter. In either case it was invalid.

The complainant states a cause of action and the demurrer should be overruled.

Dated November 17, 1928.

WM. A. CANT,
United States District Judge.

(Endorsed): Order and Memorandum. Filed November 19, 1928. Joel M. Dickey, Clerk, By Margaret L. Mullane, Deputy.

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10 (Judgment, March 8, 1929.)

In the District Court of the United States in and for the District of Minnesota, Third Division.

Term Minutes.

November Term, A. D. 1928.

March 8, 1929.

Friday morning.

Court opened pursuant to adjournment.

Present: Honorable William A. Cant, Judge.

United States District Court, District of Minnesota, Third Division.

Charles W. Bunn, Plaintiff,
vs.
L. M. Willcuts, as Collector of Internal Revenue for the District of Minnesota, Defendant.

Order for Judgment.

The defendant in the above entitled cause having interposed a demurrer of the complaint, and the same having

been heard and overruled by the Court, and the defendant having declined to plead further, it is now, on motion of the plaintiff,

Ordered that judgment be entered in favor of the plaintiff and against the defendant in the amount claimed in the complaint, with interest to the date of said judgment at the rate of six per cent, and with the plaintiff's actual disbursements to the marshal for service of summons and to the clerk for clerk's fees, but without any other costs.

Dated March 5, 1929.

WM. A. CANT
United States District Judge.

Wherefore, in accordance with said order for judgment, it is by the Court

Considered, Ordered and Adjudged: that the plaintiff herein, Charles W. Bunn, do have and recover of and from the defendant herein, L. M. Willcuts, as Collector of Internal Revenue for the District of Minnesota, the sum of ninety-nine and 51/100 dollars ($99.51), together with interest thereon at the rate of six per cent (6%) per annum from
11 May 8, 1928, amounting to the sum of three and 95/100 dollars ($3.95), together with costs and disbursements herein taxed at the sum of twelve and 06/100 dollars ($12.06), and amounting in all to the sum of one hundred fifteen and 52/100 dollars ($115.52).

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12 Notice of Appeal.

To the above-named plaintiff, and to Doherty, Rumble, Bunn & Butler, his attorneys:

Please take notice that the above-named defendant, L. M. Willcuts, conceiving himself aggrieved by the judgment made, entered and docketed herein on the 8th day of March, 1929, in the above-entitled court, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in Defendant's Assignment of Errors, made and filed herein and a copy of which is herewith served upon you.

Dated March 14, 1929.

LEWIS L. DRILL
United States Attorney and
Attorney for Defendant.

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13 Assignment of Errors.

L. M. Willcuts, defendant in the above entitled cause, makes the following assignment of errors which he avers were committed by the Court in the rendition of the judgment against this defendant appearing upon the record herein, that is to say:

First. The Court erred in overruling the demurrer interposed by the defendant and in holding and deciding that the complaint filed herein by the plaintiff stated facts sufficient to constitute a cause of action.

Second. The Court erred in rendering judgment for the plaintiff.

Third. The Court erred in holding and deciding that the gain or profit derived from the sale of bonds or securities issued by various political subdivisions of the State of Minnesota, was not subject to Federal taxation.

Fourth. The Court erred in holding and deciding that the income sought to be taxed was "income arising from the bonds here in question."

Fifth. The Court erred in holding and deciding that Federal taxation of income arising from the sale of municipal bonds or securities before maturity, was an unwarranted interference in the governmental functions of a political subdivision of a State, and a burden upon its power to borrow money.

14 Wherefore defendant prays that the said judgment may be reversed.

Dated March 13, 1929.

L. M. WILLCUTS,
Collector of Internal Revenue for the District of Minnesota, defendant.

LEWIS L. DRILL,
United States Attorney and attorney for the defendant.

Due service of the within Notice of Appeal and Assignment of Error is hereby admitted this 14th day of March, 1929.

DOHERTY, RUMBLE, BUNN & BUTLER,
Attorneys for Plaintiff.

(Endorsed): Notice of Appeal and Assignments of Error. Filed Mar. 20, 1929, Joel M. Dickey, Clerk, by Alice M. Mulrennan, Deputy.

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15 Petition for Writ of Appeal.

The petitioner, L. M. Willcuts, Collector of Internal Revenue for the District of Minnesota, by his attorney, Lewis L. Drill, United States Attorney for the District of Minnesota, feeling aggrieved by the Judgment entered on the 8th day of March, 1929, by this Court and the Order overruling the demurrer filed herein by the defendant, does hereby appeal from said Order and Judgment of this Court in the United States Circuit Court of Appeals for the Eighth Circuit under the laws of the United States in such case made and provided.

Wherefore your petitioner further prays that an appeal in this behalf in the United States Circuit Court of Appeals aforesaid sitting at St. Louis in said Circuit for the correction of the errors complained of and herewith assigned may be allowed, and that a transcript of the record of proceedings and papers upon which the said Order and Judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated St. Paul, Minnesota, March 19, 1929.

LEWIS L. DRILL,
United States Attorney and Attorney for Defendant.

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16 Order Allowing Appeal.

On reading the petition of L. M. Willcuts, made on his behalf by Lewis L. Drill, United States Attorney, dated March 19, 1929, for appeal and consideration of the assignment of errors presented therewith, it is

Ordered, that the appeal herein be allowed as prayed for, and it is further

Ordered, that a certified transcript of the record and all proceedings be transmitted to the Circuit Court of Appeals for the Eighth Circuit.

Dated Minneapolis, Minnesota, March 19, 1929.

WM. A. CANT,
United States District Judge.

(Endorsed): Order Allowing Appeal, Filed Mar. 20, 1929, Joel M. Dickey, Clerk, by Alice M. Mulrennan, Deputy.

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17 Praecipe for Transcript.

To Joel M. Dickey, Clerk of above entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Judicial Circuit, under the appeal heretofore perfected to said Court, and include in said transcript the following pleading, proceedings, and papers on file, to-wit: Complaint, Demurrer to Complaint, Order Overruling Demurrer and Memorandum Opinion, Order for Judgment, Judgment, Petition for Writ of Appeal, Order Allowing Appeal, Notice of Appeals, Assignment of Errors, Citation, and this Praecipe.

Said transcript to be prepared as required by the rules of this Court and the United States Circuit Court of Appeals for the Eighth Circuit; and to be on file at the City of St. Louis, Missouri, on or before April 1, 1929.

LEWIS L. DRILL,
United States Attorney and Attorney for Appellant.

Appellee hereby agrees that the foregoing within mentioned pleadings, proceedings and papers shall be and constitute the transcript and record as on appeal herein.

DOHERTY, RUMBLE, BUNN & BUTLER,
Attorneys for Appellee.

(Endorsed): Praecipe for Transcript, Filed Mar. 20, 1929, Joel M. Dickey, Clerk, by Alice M. Mulrennan, Deputy.

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18 (Election as to Printing of Record.)

Appellant in the foregoing entitled action hereby gives notice of his election to take and file in the Appellate Court, to be printed under the supervision of its Clerk under its rules, the transcript of the record on appeal herein.

Dated March 14, 1929.

LEWIS L. DRILL,
United States Attorney and Attorney for Appellant.

(Endorsed): Notice of Election, filed Mar. 20, 1929, Joel M. Dickey, Clerk, by Alice M. Mulrennan, Deputy.

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19 Citation.

United States District Court, District of Minnesota, Third Division.

Charles W. Bunn, Plaintiff,
No. 1872. vs. At Law.
L. M. Willcuts, as Collector of Internal Revenue for the District of Minnesota, Defendant.

United States of America, To Charles W. Bunn—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, thirty days from and after the day this citation bears date pursuant to a Notice of Appeal filed in the Clerk's Office of the District Court of the United States for the District of Minnesota, Third Division, wherein L. M. Willcuts is appellant, and you are Appellee; to show cause, if any there be, why the judgment rendered against the said appellant, as in said Notice of Appeal mentioned, should not be reversed, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable William A. Cant, one of the Judges of said Court this 19th day of March, A. D. 1929.

WM. A. CANT,
District Judge.

Due service of the within Citation is hereby admitted this 20th day of March, 1929.

DOHERTY, RUMBLE, BUNN & BUTLER,
Attorneys for Plaintiff.

Endorsed: Filed in U. S. District Court on March 20, 1929.

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21 (Clerk's Certificate to Transcript.)

United States District Court, District of Minnesota, Third Division.

I, Joel M. Dickey, Clerk of said District Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the fore-

going, consisting of twenty-one pages, numbered consecutively from 1 to 21, inclusive, is a true and complete transcript of the records, pleadings, orders, final judgment and other proceedings in the case of Charles W. Bunn, plaintiff, vs. L. M. Willcuts, as Collector of Internal Revenue for the District of Minnesota, defendant, as appears from the original records and files of said Court and in accordance with a praecipe for such transcript, a copy of which is included in said transcript; and I do further certify and return that I have annexed to said transcript and included within said paging the original Citation, together with the admission of service thereof.

In witness whereof, I have hereunto set my hand as the Clerk aforesaid, and affixed the seal of said Court at St. Paul, in said District, this 23rd day of March, 1929.

Seal
U. S. Dist. Court
Dist. of Minnesota
Third Div.

JOEL M. DICKEY, Clerk,
By Margaret L. Mullane,
Chief Deputy.

Filed Mar. 25, 1929. E. E. Koch, Clerk.

14 [Appearances of counsel omitted in printing.]

15 [Minute entry of argument and submission, June 4, 1929, omitted in printing.]

16 In United States Circuit Court of Appeals, Eighth Circuit

No. 8565. May term, A. D. 1929

L. M. WILLCUTS, AS COLLECTOR OF Internal Revenue, etc., appellant vs. CHARLES W. BUNN, APPELLEE	Appeal from the District Court of the United States for the District of Minnesota

Mr. William T. Sabine, jr., special attorney, Bureau of Internal Revenue (Mr. Lewis L. Drill, United States attorney, Mr. C. M. Charest, General Counsel, Bureau of Internal Revenue, Mr. M. W. Goldsworthy, special attorney, Bureau of Internal Revenue, and Mr. T. H. Lewis, jr., special attorney, Bureau of Internal Revenue, were on the brief), for appellant.

Mr. Charles Bunn (Messrs. Doherty, Rumble, Bunn & Butler were with him on the brief) for appellee.

Before STONE, BOOTH, and GARDNER, Circuit Judges

Opinion

Filed September 16, 1929

STONE, Circuit Judge, delivered the opinion of the court.

During 1919 and 1920 appellee purchased, as investments, certain bonds issued by counties or by cities in Minnesota. In January, 1924, he sold these bonds at a net profit (not including accrued interest). A tax was paid (under protest) upon this profit as taxable income of appellee. This action is for refund thereof on the
17 ground that such income is not subject to Federal taxation because derived from municipal securities of a State. This appeal is from a judgment entered against appellant, upon his election to stand upon an overruled demurrer to the petition.

The sole issue is whether profits from sales of municipal securities are subject to Federal taxation.

It is a necessary condition of our dual form of government over the same territory that neither the National nor the State Governments should interfere with the proper functioning of the other. Therefore it has been repeatedly announced that neither the Federal Government nor a State government can constitutionally enact a law which interferes with the proper exercise of the governmental

powers of the other. (Gillespie v. Oklahoma, 257 U. S. 501; Collector v. Day, 11 Wall. 113; McCulloch v. Maryland, 4 Wheat. 316.) This principle has been applied to taxation by either of the securities issued by the other (The Macallen Company v. Massachusetts, — U. S. —; Plummer v' Coler, 178 U. S. 115, 117; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 583; Home Ins. Co. v. New York, 134 U. S. 594, 598; Mercantile Bank v. New York, 121 U. S. 138; Bank of Commerce v. New York City, 2 Black 620; Weston v. Charleston, 2 Pet. *449), since no governmental function is more important nor necessary than that of raising revenue for its needs by borrowing (Weston v. Charleston, 2 Pet. *449, *465). The above citations have applied the rule to attempts to tax the security as property or the interest derived therefrom as income. While taxation of a privilege where the tax was measured by property or income consisting in whole or part of such securities has been upheld (Greiner v. Lewellyn, 258 U. S. 384; Flint v. Stone Tracy Co., 220 U. S. 107; Home Ins. Co. v. New York, 134 U. S. 594; Hamilton Co. v. Massachusetts, 6 Wall. 632), yet the distinction has been carefully observed "between an attempt to tax the property or income as such and to measure a legitimate tax upon the privileges involved in the use hereof" (The Macallen Co. v. Massachusetts, — U. S. —), and no tax has been sustained where it was levied directly upon such securities or the incomes therefrom.

This tax is a direct tax upon income. That income is derived solely from the municipal securities. Does the circumstance that this income came from sale profit instead of interest prevent
18 application of the rule? The reason for the rule, as applied to such securities, is that such a direct tax is a "burden on loans" and an "impediment to the power of borrowing." (Weston v. Charleston, 2 Pet. *499, *468.) Anything which would usually influence the public in buying or refraining from buying such securities unquestionably is a burden upon such loans and an impediment to such borrowing power. It is a matter of common knowledge that municipal securities are almost always issued for a long term of years. If the original buyers of such from the municipalities were confined to those who expect to hold such until maturity, comparatively few such securities would issue and upon terms not favorable to the municipalities. It is also common knowledge that the interest rate on such securities is usually lower than upon currently issued private securities. Two of the main attractions of such securities are that they are tax free and offer a chance for profit in resale. To say that taxation upon such profit would not affect purchases, and therefore prices, of such securities seems unfounded. It would materially lessen the attractiveness of such securities and thereby affect the borrowing power injuriously. When this detrimental situation is brought about by a direct tax upon such profit as such, the rule relied upon by appellee and announced in the above citations and in other cases is applicable and controlling.

The judgment should be and is affirmed.

19 In United States Circuit Court of Appeals, Eighth Circuit

No. 8565

L. M. WILLCUTS, AS COLLECTOR OF INTERNAL REVENUE FOR THE District of Minnesota, appellant

vs.

CHARLES W. BUNN

Judgment

September 23, 1929

Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed with costs, and that Charles W. Bunn have and recover against L. M. Willcuts, as collector of internal revenue for the District of Minnesota, the sum of twenty-six dollars for his costs herein.

20 In United States Circuit Court of Appeals

Motion for stay of mandate

Filed October 28, 1929

Treasury Department, Bureau of Internal Revenue, Washington

424 POST OFFICE BUILDING, SAINT PAUL MINNESOTA,
MWG OTT *October 14, 1929.*

Hon. KIMBROUGH STONE,
Judge United States Circuit Court
of Appeals, Eighth Circuit,
St. Louis, Missouri.

In re: Willcuts, Collector, v. Charles W. Bunn.

DEAR SIR: Reference is made to the above-entitled case and to a letter received from the General Counsel of the Bureau of Internal Revenue under date of October 7, 1929, a part of which is herewith quoted:

"This case having been decided adversely to the United States, you are requested to see that the mandate is stayed and such other steps taken as are necessary to protect the Government's interests pending receipt of advices from the Attorney General as to whether or not a petition for certiorari will be filed."

Upon receipt of the above-mentioned letter the writer conferred with Judge Booth, who suggested that the matter be referred to you, with a request that the mandate herein be stayed for an additional thirty days beyond the sixty-day period that ordi-
21 narily prevails, for the purpose of allowing the Attorney General sufficient time to determine the advisability of petitioning for a writ of certiorari. Accordingly such request is herewith made.

I would appreciate your notifying me with regard to the above.

Respectfully,

M. W. GOLDSWORTHY,
Special Assistant to the United States Attorney.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order staying issuance of mandate

October 28, 1929

On consideration of the motion of counsel for appellant it is now here ordered by this court that the issuance of the mandate herein be, and the same is hereby, stayed until December 16, 1929, pending a petition to the Supreme Court of the United States for a writ of certiorari, and if on or before that date there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed and proof by affidavit of notice thereof under paragraph 3 of rule 38 of the Supreme Court be given, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

22 [Clerk's certificate to foregoing transcript omitted in printing.]

23 Supreme Court of the United States

Order allowing certiorari

Filed January 27, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 34666. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 535. L. M. Willcutts, as collector of internal revenue for the District of Minnesota, petitioner, vs. Charles W. Bunn. Petition for writ of certiorari and exhibit thereto. Filed December 23, 1929. File No. 34666.

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